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H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1421 (8th Cir. 1996) (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987); see also Gaming World Int'l v. White Earth Band of Chippewa Indians, 317 F.3d 840, 847 (8th Cir. 2003) (“[A]n action filed in order to avoid tribal jurisdiction. . . necessarily asserts federal law.”). This Court’s exercise of jurisdiction is premised on the exhaustion of tribal remedies – a prerequisite that has been met in this case.

Procedural Background

Sioux Falls Construction Company entered into a contract with the Flandreau Santee Sioux Tribe to serve as the general contractor for the construction of an addition to the Royal River Casino & Motel near Flandreau, South Dakota (“the Project”). (Ex. A, Aff. William P. Fuller.) Sioux Falls Construction Company subsequently entered into several subcontracts to complete various aspects of the Project, including Plaintiffs Fox Drywall & Plastering, Inc., S and S Builders, Inc., G & D Viking Glass, Inc. and H&R Roofing of South Dakota, Inc.¹ (collectively referred to herein as “the Subcontractors”). (Id., Ex. B².)

¹ Gene Rollinger Construction, Inc., also subcontracted with Sioux Falls Construction on the Project but is not a plaintiff in this declaratory judgment action.

² A copy of the subcontract between Sioux Falls Construction and S and S Builders is included as Exhibit B to the Affidavit of William P. Fuller. The subcontracts utilized by Sioux Falls Construction and signed by the other subcontractors were substantively identical and have not been included for purposes of limiting the documentation this Court must review. However, the signature page for each subcontractor has been included in Exhibit B.

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On March 18, 2008, the Flandreau Santee Sioux Tribe filed suit against Sioux Falls Construction in Flandreau Santee Sioux Tribal Court, alleging breach of contract, breach of warranty, deceit, bad faith and breach of the independent duty of habitability. (Id., Ex. A.) Sioux Falls Construction subsequently filed third-party indemnity and contribution actions against the Subcontractors. (Id., Ex. C). Subcontractor S and S Builders filed a motion to dismiss arguing that the tribal court did not have civil jurisdiction over the third-party indemnity/contribution actions involving only non-member third-party defendants under either of the Montana exceptions. (Id., Ex. D.) Subcontractors Fox Drywall & Plastering, Inc., G & D Viking Glass, Inc. and H&R Roofing of South Dakota, Inc. joined S and S Builders' motion. (Id., Ex. E.) After briefing by both parties, the trial court issued a memorandum decision dated July 9, 2009, wherein it concluded that the tribal court had civil jurisdiction over the third-party actions brought by Sioux Falls Construction. (Id., Ex. F.) The trial court concluded that the Subcontractors' subcontracts with Sioux Falls Construction created private consensual relationships with the Tribe that satisfied the jurisdictional requirements set forth in Montana. (Id.)

The Subcontractors filed a Petition for Discretionary Appeal with the Flandreau Santee Sioux Tribal Appellate Court. The Appellate Court granted the petition. After briefing by the parties, the Appellate Court concluded that the trial court had erroneously denied the Subcontractors' motions to dismiss because there was insufficient evidence of

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the “nature and extent of ‘commercial dealing’ between the parties, especially between the Flandreau Santee Sioux Tribe and the subcontractors.” (Id., Ex. G.) The Appellate Court remanded the case with instructions that the trial court conduct an evidentiary hearing for purposes of establishing a sufficient record upon which to evaluate the nature of the relationship, if any, between the Tribe and the subcontractors. (Id.)

An evidentiary hearing took place on April 29, 2010, wherein all parties presented evidence regarding the jurisdictional facts outlined in the Appellate Court’s October 3, 2009, Memorandum Opinion. (Id., Ex. H.) Following the hearing, the tribal court again denied the Subcontractors’ motions to dismiss. (Id.)

The Subcontractors filed a Second Petition for Discretionary Appeal with the Flandreau Santee Sioux Tribal Court of Appeals and the petition was again granted. After the jurisdictional issue was briefed by the parties, the Appellate Court affirmed the trial court’s order denying the Subcontractors’ motions to dismiss. (Id., Ex. I.) Notice of entry of the appellate order was filed on July 24, 2011. (Id., Ex. J.) On January 12, 2012, the matter was formally remanded to the trial court for further proceedings. (Id., Ex. K.) Having exhausted all available tribal remedies, the Subcontractors now seek declaratory and injunctive relief from this Court.

Analysis

Preliminary injunctive relief may be granted to these nonmember Subcontractors against the court proceedings in the Flandreau Santee Sioux Tribal Court while the

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jurisdictional issue is decided by this Court. See, e.g., Ford Motor Co. v. Todecheene, 394 F.3d 1170, 1173 (9th Cir. 2005); BNSF Railway Co. v. Roy, 2006 WL 1789070, at *2 (D. Ariz. 2006); UNC Resources, Inc. v. Benally, 518 F. Supp. 1046, 1053 (D. Ariz. 1981). “The primary function of a preliminary injunction is to preserve the status quo until, upon final hearing, a court may grant full, effective relief.” Kansas City Southern Transport Co., Inc. v. Teamsters Local Union #41, 126 F.3d 1059, 1066 (8th Cir. 1997) (quoting Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589, 593 (8th Cir.1984)).

The factors courts must consider when evaluating a motion for a preliminary injunction are well-established: “the threat of irreparable harm to the movant, the balance between this harm and the injury an injunction would inflict on other parties, the movant’s probability of success on the merits, and the public interest.” Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 530 F.3d 724, 729 n. 3 (8th Cir. 2008) (quoting Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir.1981)).

These factors are to be considered “flexibly” with the most significant factor being the probability of success on the merits. Bear v. Fleming, 714 F.Supp.2d 972, 978 (D.S.D. 2010). “Probability of success on the merits” does not mean the plaintiff must prove “a greater than fifty percent likelihood that he will prevail on the merits.” Dataphase Systems, Inc., 640 F.2d at 113. “A plaintiff is required to make only a prima facie showing that there has been an invasion of its rights and that a preliminary injunction is

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essential to the assertion and preservation of those rights.” Livestock Marketing Ass’n v. U.S. Dept. of Agriculture, 132 F.Supp.2d 817, 824 (D.S.D. 2001).

A. *Probability of success on the merits.*

To regulate the conduct of non-members, tribal courts must possess both judicial jurisdiction and legislative authority to regulate the activities at issue. Red Fox v. Hettich, 494 N.W.2d 638, 642 (S.D. 1993) (citing F. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 335 (1989)). The outer scope of a tribal court’s civil jurisdiction over a non-member was defined in the seminal case of Montana v. United States, where the United States Supreme Court set forth two exceptions to the general rule precluding the exercise of tribal civil jurisdiction over non-members. 450 U.S. 544, 564-66 (1981). Under the first exception, a tribe may regulate, “through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Id. The second exception permits a tribe to “exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” Id. Because neither Montana exception can be met in this case, the Subcontractors’ motion for a preliminary injunction should be granted.

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The Subcontractors and Sioux Falls Construction – the only parties to the subcontracts which provide the sole basis for the indemnity/contribution claims at issue – are non-members. “[T]ribal jurisdiction over non-members is ‘presumptively invalid.’” Progressive Specialty Ins. Co. v. Burnette, 489 F.Supp.2d 955 (D.S.D. 2007) (quoting Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001)). See Nevada v. Hicks, 533 U.S. 353, 382 (2001) (Souter, J., concurring) (“[I]t is the membership status of the unconsenting party. . . that counts as the primary jurisdictional fact.”); Smith v. Salish Kootenai College, 434 F.3d 1127, 1132-33 (9th Cir. 2006) (noting that the most important factor “courts look to when considering a tribal court’s civil jurisdiction over a case in which a nonmember is a party . . . is the party status of the nonmember.”). While this presumption establishes the starting point for this Court’s jurisdictional analysis, it is also indicative of the Subcontractor’s likelihood of success on the merits. As noted by one federal court, “where the nonmembers are defendants, the [United States Supreme] Court has thus far held that the tribes lack jurisdiction, irrespective of whether the claims arose on Indian lands.” Smith, 434 F.3d at 1132 (citing Hicks, 533 U.S. at 356); see also Hicks, 533 U.S. at 381 (Souter, J., concurring) (“A tribal court’s civil jurisdiction to adjudicate claims arising out of acts committed on the reservation in the first instance depends on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted.”). The United States Supreme Court’s jurisprudence demonstrates a concern for “defendants who are not tribal members to [defend themselves

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against ordinary claims] in an unfamiliar court.” A-1 Contractors, 520 U.S. at 442, 459 (concluding that there was no tribal jurisdiction over “run-of-the-mill” highway accident involving two non-members).

The concern for a non-member defendant’s liberty interests in tribal court served as the basis for the United States Supreme Court’s recent decision in Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008). There, as before, the Court recognized the “limited” nature of tribal jurisdiction, rejecting the argument that a non-member bank’s lease agreement with an Indian couple gave the tribal court jurisdiction to hear the Indian couple’s claim that the non-member bank’s subsequent sale of the property to a non-member buyer constituted discrimination. Id. at 340-41. The Court recognized that it is because of tribal sovereignty that a non-member defendant’s liberty interests require protection.

Tribal sovereignty. . . is a sovereignty outside the basic structure of the constitution. The Bill of Rights does not apply to Indian Tribes. Indian courts differ from traditional American courts in a number of significant respects. And nonmembers have no part in tribal government- they have no say in the law and regulations that govern tribal territory.

Id. at 337 (internal citations and quotations omitted). The Court further recognized that it is because of the limited and unique nature of tribal sovereignty that Montana’s exceptions exist – exceptions that “should not be construed in a manner that would ‘swallow the rule.’ . . or ‘severely shrink’ it.” Id. at 330 (quoting Atkinson, 532 U.S. at 655; Strate, 520 U.S. at 458). In keeping with these principles, the Plains Commerce

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Court refused to expand Montana's consensual relationship exception to create tribal jurisdiction where it did not otherwise exist. The result in this case should be no different.

The "consensual relationship" exception requires a direct rather than informal relationship between the non-member and the Tribe. See Hicks, 533 U.S. at 359, n. 3 (noting that obtaining a warrant from the Tribal Court did not constitute a consensual relationship). This essential element is lacking in this case. Sioux Falls Construction and the Subcontractors are entities owned by non-members that are incorporated under the laws of South Dakota. (Subcontractors' Affidavits³ at ¶¶ 2 and 3.) There was no privity, no contractual relationship, no agreements between the Tribe and the Subcontractors. (Id. at ¶¶ 5-8.) The only party that entered into a private consensual relationship with the Flandreau Santee Sioux Tribe was general contractor Sioux Falls Construction. (Id. ¶ 8.) Neither the general contract nor the individual subcontracts can serve as the basis for a finding of tribal jurisdiction. Tribal jurisdiction cannot be created by contract where, as here, none otherwise exists. See Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority, 207 F.3d 21, 33 (5th Cir. 2000) (stating that "the

³ The affidavit of Don Steever (S & S Builders), Ron Fox (Fox Drywall & Plastering, Inc., and Dave Duncan (G&D Viking Glass, Inc.,) which have been filed in support of Plaintiffs' Motion for Preliminary Injunction, will be collectively referred to as "Subcontractors' Affidavits. Plaintiff H&R Roofing of South Dakota, Inc., will file its affidavit at a later date.

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determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions that may be contained within the four corners of an underlying contract.”) (citing National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 855-56 (1985)). This well-recognized rule should not be defeated by a finding that the contractual obligations owed by the Subcontractors to Sioux Falls Construction created a consensual relationship between the Subcontractors and the Flandreau Santee Sioux Tribe.

The lack of significance the Subcontractors' contracts with Sioux Falls Construction hold in this jurisdictional analysis was recognized by the Flandreau Santee Sioux Appellate Court. In reversing the trial court's initial finding of jurisdiction in its October 3, 2009, opinion, the Appellate Court rejected the trial court's reliance on the boiler-plate provisions in the subcontracts for its exercise of jurisdiction, and provided it with the following guidance in analyzing Montana's consensual relationship analysis:

Such an undertaking can only be determined through an evaluation of the Tribe's regulatory structure (e.g., business license, building code requirements), relevant contract (and subcontract) provisions, and perhaps, most importantly, the testimony of officials of the Tribe, Sioux Falls Construction Company, and the various subcontractors as to their understanding of the “commercial dealing” relationship of the Tribe to the subcontractors in particular, which in turn, may be affected by these individuals and/or their mutual relationship to Sioux Falls Construction.

(Ex. G, Aff. William P. Fuller, p. 4.) Noticeably absent from the Appellate Court's suggested analysis was any mention of the subcontracts between the Subcontractors and

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Sioux Falls Construction. Of further significance is the fact that the jurisdictional considerations set forth by the Appellate Court affirmatively establish the tribal court's lack of jurisdiction over the Subcontractors in the underlying action.

With the exception of Third-Party Defendant G&D Viking Glass, Inc., none of the Subcontractors had ever worked for the Tribe in the past and the Royal River Casino project was the only work they had performed within the boundaries of the Reservation.⁴ The Tribe relied on Sioux Falls Construction to select subcontractors and the Tribe played no role in the bidding process. (Subcontractors' Affidavits, ¶¶ 10-13.) From the initiation of the Project to its completion, the Subcontractors dealt only with Sioux Falls Construction on all matters regarding the Project. (*Id.*) The Subcontractors were paid by Sioux Falls Construction, supervised by Sioux Falls Construction and took direction only from Sioux Falls Construction. (*Id.* at ¶¶ 11, 13.) The Tribe did not require, nor did the Subcontractors obtain, tribally-issued building permits or licenses. (*Id.* at ¶ 12.) The Subcontractors were not required to comply with a tribal building code. (*Id.* ¶ 13.) Based on all of the factors outlined by the Appellate Court, there was no consensual relationship

⁴ It is undisputed that G&D Viking Glass's prior business dealings bear no connection to the present action. Accordingly, these dealings do not give rise to the Tribe's jurisdiction over Sioux Falls Construction's claims against G&D Viking Glass. See Atkinson Trading Company v. Shirley, 532 U.S. 645, 656 (2001) (noting that the Tribe's exercise of jurisdiction or regulatory authority must have a nexus with the consensual relationship itself).

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between the Subcontractors and the Tribe and, as a result, no basis for a finding of tribal jurisdiction.

While tribal jurisdiction must exist separate and apart from the subcontracts, even the facts surrounding the subcontracts' execution fail to support a finding of tribal jurisdiction. Neither Sioux Falls Construction nor the Subcontractors maintain offices, employees or assets on the property of the Flandreau Santee Sioux Tribe. (*Id.* ¶ 3.) In addition, the Subcontractors do not advertise on tribal property. (*Id.* ¶ 4.) The subcontracts were all executed outside of the boundaries of the Flandreau Santee Sioux Reservation. (*Id.* at ¶ 7.) More importantly, the subcontracts expressly provided that “[n]othing in this Agreement shall be construed to create a contractual relationship between persons or entities other than the Design-Builder and Subcontractor. (Ex. B, Affidavit of William P. Fuller, ¶ 2.5.) By signing a contract with a non-member general contractor outside of tribal property, the Subcontractors did not intend to subject themselves to the jurisdiction of the Flandreau Santee Sioux Tribe. (Subcontractors' Affidavits, ¶ 14.) As in Plains Commerce, the scope of the Tribe's jurisdiction over non-members under Montana's consensual relationship exception should remain limited.

Like Montana's first exception, this Court's civil jurisdiction under the second Montana exception is very narrow, and, under these facts, cannot be satisfied. The second Montana exception permits the tribe to exercise civil jurisdiction when the non-Indians' “conduct’ menaces the ‘political integrity, the economic security, or the

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health or welfare of the tribe.” Plains Commerce Bank, 554 US at 341 (quoting Montana, 450 U.S. at 566). General allegations of economic injury are not enough to satisfy this exception. “The conduct must do more than injure the tribe, it must ‘imperil the subsistence’ of the tribal community.” Id. (internal citations and quotations omitted). “The elevated threshold for application of the second Montana exception suggests that tribal power must be necessary to avert catastrophic consequences.” Cohen § 4.02[3][c], at 232, n. 220. This threshold cannot be met.

The Subcontractors’ presence in the tribal court action has no effect on the Tribe’s ability to seek recourse for its claims against the general contractor on the project, Sioux Falls Construction. The Tribe seeks to recover damages from Sioux Falls Construction based on the duties and obligations set forth in the general contract. It is only Sioux Falls Construction that seeks redress against the Subcontractors. Because the Tribe’s claims against Sioux Falls Construction are not dependent on the Subcontractors’ presence in the tribal court action, the Subcontractors’ dismissal from this lawsuit will not cause “catastrophic consequences.” Accordingly, the second Montana exception, like the first, does not apply. The result is a prima facie case establishing that the Flandreau Santee Sioux Tribal Court has no jurisdiction over the contribution and indemnity claims asserted by Sioux Falls Construction against the Subcontractors in the underlying tribal court action.

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B. Threat of irreparable injury and balancing of the harm.

While the Subcontractors' likelihood of success on the merits is significant for purposes of analyzing the Subcontractor's request for a preliminary injunction, additional factors relevant to such an analysis also weigh in favor of granting their request. The Subcontractors will suffer irreparable injury if a preliminary injunction is not granted. The law is clear that "subjecting [a party] to proceedings before a tribunal presently under jurisdictional scrutiny by [a federal court], before it makes an ultimate ruling on whether or not said tribunal is jurisdictionally sound would cause irreparable injury to [that party]." Hicks v. Bush, 397 F. Supp.2d 36, 41-42 (D.D.C. 2005). If the trial goes forward and [this Court] later determines that [the tribal court] lacks jurisdictional authority, 'setting aside the judgment after trial. . . insufficiently redresses [the Subcontractor's] right not to be tried by a tribunal that has no jurisdiction.'" Id. at 42. Indeed, as one federal district court concluded when it issued an injunction halting proceedings against a nonmember in tribal court, without the injunction, the tribal member would be

faced with the possibility of irreparable injury if it were forced to appear and defend in Tribal Court. Since there is no avenue of appeal or other recourse to another forum from the Tribal Courts, UNC would effectively be denied the opportunity to avoid the overreaching tribal jurisdiction if this Court were to deny the request for an injunction.

UNC Resources, Inc. v. Benally, 518 F. Supp.2d 1046, 1053 (D. Ariz. 1997). Here, the Subcontractors have already presented their jurisdictional arguments to the tribal court

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system. There is now no way for the Subcontractors to prevent the irreparable injury of a trial by a tribunal without jurisdiction unless this Court acts to prohibit the tribal court from proceeding in Sioux Falls Construction's indemnity/contribution claims against the Subcontractors. This does not leave Sioux Falls Construction without a remedy. Sioux Falls Construction can bring its contribution and indemnity claims against the Subcontractors in South Dakota state court. As such, "the balance of hardships tips in favor of [the Subcontractors] since [Sioux Falls Construction's] injuries may be redressed in a state court of competent jurisdiction." *Id.* at 1053. Accordingly, these factors too weigh in favor of granting the Subcontractors' request for a preliminary injunction.

C. Public interest.

The public interest component of this Court's analysis also weighs in the Subcontractors' favor. Staying the tribal court proceedings is in compliance with the principle that tribal courts have limited jurisdiction over non-members while permitting this Court to make such a determination is clearly in the public interest. As explained by one federal court, "[i]t would not be in the public interest to subject [the Subcontractors] to a process which [this Court] may determine to be invalid. It is in the public interest to have a final decision, leaving no doubts as to this key jurisdictional issue, before [the Subcontractors' tribal court] proceedings begin." *Hicks*, 397 F. Supp.2d at 43.

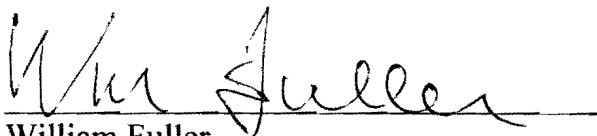
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Conclusion

Having exhausted their tribal remedies, the Subcontractors' request for a preliminary injunction is appropriate both jurisdictionally and substantively. The tribal court does not have jurisdiction over Sioux Falls Constructions' contribution and indemnity claims against the Subcontractors – claims that arise out of a contract between two non-members. The posture of this dispute and the facts surrounding the same fail to overcome the presumption that tribal jurisdiction over non-members is invalid. Because the Subcontractors have established a substantial likelihood of success on the merits, they respectfully request that this Court grant their motion, and issue a preliminary injunction barring all further proceedings in tribal court, including discovery, see, e.g., BNSF Railway Co., 2006 WL 1789070, at * 2, until this Court can make a decision on the merits as to the jurisdictional issues presented.

Dated this 13th day of February, 2012.

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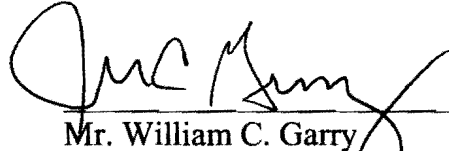
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Dated this 13th day of February, 2012.

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A handwritten signature in black ink, appearing to read 'W. C. Garry', is written over a horizontal line.

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